

Memorandum 2000-31

**Affidavit Under Fish and Game Code Section 2357
(Comments on Tentative Recommendation)**

In January, the Commission circulated for comment a tentative recommendation on *Affidavit Under Fish and Game Code Section 2357* (enclosed with Commissioners' copies of this memorandum). The tentative recommendation proposes to repeal Fish and Game Code Section 2357, which makes it unlawful to carry trout into an area where the season is closed, unless a notarized affidavit was previously made in duplicate in the area where the trout were taken and the duplicate was left on file with the notary. (All further statutory references are to the Fish and Game Code, unless otherwise indicated.) This memorandum discusses the comments on the tentative recommendation and other developments relating to the proposal.

The following materials are attached for the Commission's review:

	<i>Exhibit pp.</i>
1. Milton G. Valera, President, National Notary Ass'n (Jan. 18, 2000)	1
2. Ann S. Malcolm, Deputy General Counsel, Dep't of Fish & Game (Jan. 28, 2000)	2
3. Bill Jones, Secretary of State (Feb. 9, 2000)	3
4. Anonymous email message (March 12, 2000)	4
5. Yang & Kelso, <i>Transportation of Trout Into Closed Areas</i> (Inst. Legis. Prac. 1998)	5
6. Smith & Kelso, <i>Possession of Fish During "Open Season Where Taken"</i> <i>Pursuant to Fish & Game Code Section 2001: A Brief Legislative History</i> (Inst. Legis. Prac. 2000)	8

SB 1487 (KNIGHT)

While the tentative recommendation was circulating for comment, Senator William "Pete" Knight contacted the Commission seeking suggestions for obsolete statutes to repeal. Upon learning of the proposal to repeal Section 2357 and reviewing the tentative recommendation and related materials, Senator Knight introduced a bill to repeal the provision (SB 1487 (Knight)). The bill has

already passed the Senate (on the consent calendar) and is pending in the Assembly.

SUPPORT

Importantly, the Department of Fish and Game “agrees with the tentative recommendation” to repeal Section 2357. (Exhibit p. 2.) The Secretary of State’s office “concurs that the statute may be repealed without adverse effect.” (Exhibit p. 3.) The National Notary Association also supports the repeal, because

it is not the function of a Notary to serve as a public document repository. California Notaries do keep a bound journal record of their official acts, but are not asked to retain copies of the documents they notarize. Only in Civil Law nations do Notaries maintain a portfolio of notarized documents.

(Exhibit p. 1.)

OTHER COMMENTS

The only other comment that the Commission received was an anonymous email message. (Exhibit p. 4.) Instead of directly commenting on the Commission’s tentative recommendation, the message criticizes an analysis of Section 2357 that was prepared by Prof. J. Clark Kelso (Institute for Legislative Practice, McGeorge School of Law) and one of his students (Exhibit pp. 5-7), which is cited in the tentative recommendation. In particular, the message (1) claims that Prof. Kelso suggests that the purpose of Section 2357 is to make money, and (2) proposes that “an equally plausible reason behind the law is to prevent illegal planting of fish!” (Exhibit p. 4.)

These assertions do not hold water. Although Prof. Kelso and his student point out that “a violation of Section 2357 carries with it the same penalty as the crime of taking trout in an area where the season is closed” (Exhibit p. 5), they also state that “the primary and perhaps sole purpose of this statute is to eliminate an excuse which a defendant charged with taking trout in an area where the season is closed might otherwise have; to wit, that the trout was actually taken legally at another location and transported to the location where the defendant was arrested” (*Id.*). Similarly, the tentative recommendation says

that Section 2357 presumably “is intended to facilitate determination of whether ... trout were lawfully taken.”

It is not plausible that the statute is intended to prevent illegal planting of trout (i.e., illegal placing of live trout in California waters). The provision is in a chapter of the Fish and Game Code entitled “Importation and Transportation of *Dead* Birds, Mammals, Fish, Reptiles, and Amphibia,” in an article called “*Dead* Wild Birds, Mammals, Fish, Reptiles, and Amphibia.” (Emphasis added.) The immediately preceding chapters are “Importation, Transportation, and Sheltering of Restricted *Live* Wild Animals” and “Importation and Transportation of *Live* Plants and Animals.” (Emphasis added.) The latter chapter includes an article on “Aquatic Plants and Animals,” which is further evidence that live fish are not within the purview of Section 2357. Perhaps most importantly, another chapter of the Fish and Game Code pertains specifically to “Stocking Aquatic Organisms” (Chapter 3 of Division 12). It includes provisions on placing fish and other aquatic plants and animals in California waters. (Sections 15200-15202.) Because planting of fish is expressly addressed in these provisions, it is a stretch to construe Section 2357 to cover the same topic.

Moreover, the requirements of the statute do not make sense as applied to planting of fish. Section 2357 provides:

2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.

To “take” an animal means to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” (Section 86.)

There is no logical connection between (1) requiring an affidavit stating “the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout,” and (2) preventing illegal planting of fish. An affidavit to that effect would be of no use to either the prosecution or the defense in a prosecution for illegal planting of fish, nor would it in any way deter or have any other relevance to illegal planting of fish. In contrast, the relationship to illegal taking of fish is clear: The affidavit helps to

establish that the fish were taken in an area where the season was open, not in an area where the season is closed.

Even more fundamentally, although the email message postulates that the purpose of Section 2357 is to prevent illegal planting of trout, the author does not present any reason for retaining rather than repealing the provision. The message urges the Commission to carefully study the provision before drawing any final conclusions, but acknowledges that there “may be valid reasons for repeal of the law.” (Exhibit p. 4.) Because the message does not demonstrate a need for Section 2357, it should not deter the Commission from recommending repeal of the provision.

IMPACT OF SECTION 2001

In the course of research for this study, Commission staff came across Section 2001, which provides:

2001. (a) Unless otherwise provided, it is unlawful to possess fish, reptiles, or amphibia except during the open season where taken and for 10 days thereafter; and not more than the possession limit thereof may be possessed during the period after the close of the open season.

(b) Except as provided in Section 3080, it is unlawful to possess game birds or mammals except during the open season where taken.

Conceivably, this provision could be interpreted to prohibit possession of trout (and other fish, reptiles, or amphibia) except in the area where they were lawfully taken, and even then only during the open season and for ten days thereafter. If this interpretation were correct, then carrying trout into an area where the season is closed would be illegal even if Section 2357 were repealed, because it would violate Section 2001.

Prof. Kelso and one of his students have researched the legislative history of Section 2001, however, and concluded that the provision should not be so interpreted. (Exhibit pp. 8-13.) Rather, the phrase “open season where taken” denotes the time period during which possession of fish, reptiles, and amphibia is permitted (i.e., the critical open season is the one where the animal was taken, not the open season in some other place).

Commission staff assisted with and concur in this analysis. Because Section 2001 does not impose a geographic restriction on possession of trout, carrying

trout into an area where the season is closed does not violate the provision, so long as the season is open where the trout were taken (and for ten days thereafter). Repealing the affidavit requirement of Section 2357 should suffice to legalize such conduct, consistent with common expectations.

RECOMMENDATION

Based on the research conducted and support letters received, the concept of repealing Section 2357 appears sound. There is no evidence that the provision is being used or that it will be missed if repealed.

Commission staff have revised the tentative recommendation to incorporate information not previously included (see the attached draft). **With these refinements and whatever other revisions the Commission deems appropriate, we recommend that the Commission approve the proposal as a final recommendation.**

Respectfully submitted,

Barbara S. Gaal
Staff Counsel



NATIONAL NOTARY ASSOCIATION

January 18, 2000

Law Revision Commission
RECEIVED

JAN 20 2000

File: J-1308

Ms. Barbara S. Gaal
Staff Counsel
California Law Revision Commission
4000 Middlefield Rd., Room D-1
Palo Alto, CA 94303-4739

RE: Affidavit Under Fish And Game Code Section 2357

Dear Ms. Gaal:

Thank you for your letter of January 12 about the Commission's proposal to repeal Fish and Game Code Section 2357, which now makes it unlawful to carry trout into an area where the season is closed unless the angler presents a notarized affidavit and a duplicate has been filed with the Notary.

The National Notary Association supports this repeal because it is not the function of a Notary to serve as a public document repository. California Notaries do keep a bound journal record of their official acts, but are not asked to retain copies of the documents they notarize. Only in the Civil Law nations do Notaries maintain a portfolio of notarized documents.

Thank you for giving us the opportunity to respond to this proposal of the California Law Revision Commission.

Sincerely,

Milton G. Valera
President

MV:cf

DEPARTMENT OF FISH AND GAME

1416 NINTH STREET
P. O. BOX 9442098
SACRAMENTO, CA 94244-2090
(916) 654-3821



January 28, 2000

Law Revision Commission
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MAR - 3 2000

File: J-1308

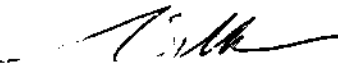
Barbara S. Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

Re: Tentative Recommendation J-1308
Fish and Game Code section 2357

Dear Ms. Gaal:

This letter shall serve as formal notice that the Department of Fish and Game agrees with the tentative recommendation of the California Law Revision Commission to repeal Section 2357 of the Fish and Game Code (*Affidavit for carrying trout into closed area*). If you have any questions, feel free to contact me at (916) 654-3821.

Sincerely,


ANN S. MALCOLM
Deputy General Counsel

ASM/rkh

cc: David Bunn, Deputy Director
Legislation and Intergovernmental Affairs

Rich Elliott, Chief
Conservation and Enforcement Branch

DIVISIONS

Archives
Business Programs
Business Filings
Notary Public
Uniform Commercial Code
Elections
Information Technology
Management Services
Political Reform



BILL JONES
Secretary of State
State of California
February 9, 2000

EXECUTIVE OFFICE
1500 11th Street, 6th Floor
Sacramento, CA 95814
P.O. Box 944260
Sacramento, CA 94244-2600
(916) 653-7244
(916) 653-4620 FAX
Internet address: www.ss.ca.gov

Law Revision Commission
RECEIVED

FEB 11 2000

Barbara S. Gaal
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

File: _____

Dear Ms. Gaal:

Thank you for your recent correspondence dated January 12, 2000, regarding the Law Revision Commission's tentative recommendation on the *Affidavit Under Fish and Game Code Section 2357*.

In your letter, you encourage comments on the tentative recommendation. My staff has reviewed the proposed legislation and concurs that the statute may be repealed without adverse effect.

Please contact me should you require additional assistance on this or any other issue.

Sincerely,

A handwritten signature in black ink that reads "Bill Jones".

BILL JONES
Secretary of State

BJ:arp
#00-0070

From: bob99@earthlink.net

Date: Sun, 12 Mar 2000 11:01:40 -0800

To: comment@clrc.ca.gov

Subject: Comments on proposal to repeal of FGC §2357 - Trout

Dear LRC,

Regarding your proposal to repeal of FGC §2357 concerning the transport of trout, in making your decision I hope you rely on information that is more objective than the "analysis" prepared by Mr. Clark Kelso, et al. I have three points I hope you will seriously consider.

1. Mr. Kelso's analysis is clearly biased. I would expect better from him. There is little objectivity in his analysis. There should be an analysis of the legislative history behind the statute's enactment -- where is that?? Is the reason behind the statute no longer valid (see 2. and 3. below for more on this)? In fact, the allegation that the statute was enacted as way to make money is amazing. His analysis first speculates that this is why the law was enacted, then the analysis proceeds as if this premise is "the truth" -- this type of analytical tactic I would expect from a politician, not an academic legal scholar. In short, I hope the commission has a more objective, structurally sound analysis to rely than just the Kelso et al. analysis.

2. Mr. Kelso strongly suggests the main reason for the law is that it is supposed to be a money maker. It seems an equally plausible reason behind the law is to prevent illegal planting of fish! Just look at the mess the Department of Fish and Game has stumbled into at Lake Davis. Mr. Kelso's analysis fails to consider the Legislative Committee analyses, or the Legislative Counsel's digest to the enactment of the law. Why?? This seems extremely relevant. And if you do look, if the Committee analyses or the Legislative Counsel digest say anything, I bet they cite illegal planting as a concern. How does Mr. Kelso propose the Department of Fish and Game handle illegal planting, or what is the Game Warden in the field supposed to do?? Why doesn't the analysis take up the perspective of the Game Warden in the field, doing their job -- how does he or she prevent the illegal transport of fish? Since Mr. Kelso's analysis fails to consider this perspective, at least the LRC should consider it, and propose a solution if the LRC recommends repeal of the law, since Kelso et al. didn't propose a solution.

3. Where are the numbers supporting Kelso's allegation that the purpose of the statute is a money maker? Where is the analysis from the 50+ County District Attorney's Offices showing how many times the statute has been charged -- and the total of fines collected and jail time imposed?? Where are the numbers showing how many times the Department of Fish and Game asked a District Attorney's Office to charge this violation (which is different from the D.A. actually charging)? Where is the analysis of whether the District Attorney's of the various Counties feel the law is valuable in their County -- as protective of fish and wildlife resources -- or the District Attorney's statutory interpretation behind the purpose of the law, since they have to argue it in Court?? Where is the Department of Fish and Game's opinion??

Conclusion: There may be valid reasons for repeal of the law -- but it would be embarrassing to cite the Kelso et al. analysis as the LRC's sole justification for recommending a repeal.

TRANSPORTATION OF TROUT INTO CLOSED AREAS
(November 30, 1998)

This memorandum reviews issues concerning Fish & Game Code § 2357 relating to the carrying of trout into closed areas. The section was amended as part of the implementation of trial court unification to remove obsolete references to the justice court. Because the section, as amended, seemed to be archaic, it was added to the list of issues appropriate for future study.

Section 2357 provides as follows (for clarity of understanding, the references to the justice court and their deletion is included in this quote):

2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before ~~the nearest judge of the justice court or~~ a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the ~~judge of the justice court or~~ notary public before whom the affidavit is made.

It appears that the primary and perhaps sole purpose of this statute is to eliminate an excuse which a defendant charged with taking trout in an area where the season is closed might otherwise have; to wit, that the trout was actually taken legally at another location and transported to the location where the defendant was arrested. If a defendant attempts to raise this factual argument in defense, the arresting officer or prosecutor can then demand that the defendant produce the affidavit or the name of the notary public or justice court judge before whom the defendant made the affidavit as required by Section 2357. Since it is unlikely in the extreme that the defendant will have executed the required affidavit, the prosecution can charge the defendant with a violation of Section 2357 and avoid having to litigate the question of whether the trout was taken legally elsewhere and then transported into an area where the season is closed. In light of this likely purpose, it is perhaps not coincidental that a violation of Section 2357 carries with it the same penalty as the crime of taking trout in an area where the season is closed (§§ 2000-2002) (both are misdemeanors under Sections 12000 & 12002 punishable by a fine of not more than \$1,000 and/or imprisonment for not more than six months). In short, Section 2357 appears to have been enacted with the expectation that its affidavit requirement would virtually never be met.

Research did not reveal any recent prosecutions for a violation of Section 2357. Section 2357 is not mentioned in the Fishing Guide distributed by the Department of

Fish and Game. When contacted, Fish and Game personnel were surprised to learn of Section 2357's existence.

Section 2357 raises modest due process concerns because it effectively criminalizes an activity that an ordinary person would not think carries with it any legal consequences at all (i.e., carrying trout into an area where the trout season is closed), and it criminalizes the activity by relying upon a person's failure to do something that no ordinary person would think of doing (i.e., rushing to the nearest notary public to file a trout affidavit before traveling into an area where the trout season is closed). It is worthy of note in this regard that Section 2360 provides a contrary rule for black and spotted bass ("Black bass and spotted bass lawfully taken may be carried or transported into and possessed in an area where the season is closed").

Needless to say, the rule that "ignorance of the law will not excuse" is deeply embedded within our legal culture. *Shevlin-Carpenter Co. v. State of Minnesota*, 218 U.S. 57, 68 (1910). Applying this principle, the presence of Section 2357 on the books arguably provides sufficient constructive notice so that a prosecution for its violation satisfies due process.

However, the Supreme Court has held that due process can be violated by a criminal statute or ordinance that criminalizes a failure to act in circumstances where no reasonable person would think there was any obligation to act. In *Lambert v. California*, 355 U.S. 225 (1958), the Court held that due process was violated by a prosecution under a City of Los Angeles ordinance which required all convicted felons who remained in the city or planned on remaining within the city for longer than five days to register. The defendant had no actual knowledge of the registration requirement, and the issue was whether "a registration act of this character violates due process where it is applied to a person who has no actual knowledge of his duty to register, and where no showing is made of the probability of such knowledge." *Id.*, 355 U.S. at 227. The Court held that due process was violated, emphasizing that the ordinance (1) criminalized "conduct that is wholly passive--mere failure to register" (*id.*, 355 U.S. at 228), (2) criminalized a failure to act in the absence of any "circumstances which might move one to inquire as to the necessity of registration" (*id.*, 355 U.S. at 229), and (3) criminalized the failure to register merely to implement "a law enforcement technique designed for the convenience of law enforcement agencies" (*id.*). The Court held that "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand." *Id.*

Fish & Game Code § 2357 is similar to the ordinance struck down in *Lambert* because Section 2357 criminalizes a failure to act (i.e., failure to obtain a notarized affidavit) under circumstances where no one could reasonably be expected to know of the affidavit requirement or even of the need to inquire as to the necessity of an affidavit, and the section is apparently designed primarily (if not exclusively) for the

convenience of law enforcement officials in policing the unlawful taking of trout (there being no plausible state interest in the private transport of lawfully taken trout).

Lambert has been clarified by the Supreme Court in subsequent cases. For example, in *U.S. v. International Minerals*, 402 U.S. 558 (1971), the Court stated that “where . . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.” *Id.*, 402 U.S. at 559. Arguably, the regulation of the location and time for taking trout (i.e., the establishment of a trout season) should put a fisher on notice of the possibility of a regulation like Section 2357. However, Section 2357 does not regulate the taking of trout. Instead, it regulates the transport of trout without securing an affidavit. It does not seem likely that a person who has lawfully taken a trout would believe that the transport of that trout within the state (as opposed to import or export or commercial shipping) is a regulated activity. As noted above, the state’s Fishing Guide does not even mention Section 2357.

In his great work, *The Common Law*, Holmes wrote, “A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.” *The Common Law*, pp. 49-50 (1881). Section 2357 appears to cross the line between fair regulation and unfair trap-setting. We recommend the repeal of Section 2357.

Respectfully submitted,

Joel Yang & J. Clark Kelso
Institute for Legislative Practice

POSSESSION OF FISH DURING "OPEN SEASON WHERE TAKEN"
PURSUANT TO FISH & GAME CODE SECTION 2001:
A BRIEF LEGISLATIVE HISTORY
(April 5, 2000)

In our November 30, 1998, memorandum entitled "Transportation of Trout into Closed Areas," the Institute for Legislative Practice recommended the repeal of Section 2357 of the Fish & Game Code because it was not being enforced by the Department of Fish and Game and appeared to criminalize conduct which an ordinary member of the community would not think was blameworthy (i.e., carrying trout into an area where the season is closed without filing an affidavit indicating where and when the trout was taken). Based in part on that memorandum, the California Law Revision Commission issued a Tentative Recommendation recommending the repeal of Section 2357. Before the Commission could finalize its recommendation, Senator Knight introduced SB 1487, which would repeal Section 2357. SB 1487 has now been approved by the Senate and awaits action in the Assembly.

The introduction of SB 1487 has accelerated our review of Section 2357 and possibly related Fish & Game Code provisions. In the course of this review, staff for the Commission drew the Institute's attention to Fish & Game Code § 2001. Section 2001 provides as follows:

(a) Unless otherwise provided, it shall be unlawful to possess fish, reptiles, or amphibia except during the open season where taken and for 10 days thereafter; and not more than the possession limit thereof may be possessed during the period after the close of the open season.

(b) Except as provided in Section 3080, it is unlawful to possess game birds or mammals except during the open season where taken.

1998 Cal. Stats., ch. 531.

The phrase "during the open season where taken and for 10 days thereafter" is reasonably susceptible of two interpretations. One interpretation is that a fish, reptile or amphibia may be possessed anywhere in the State during the appropriate open season and for 10 days thereafter so long as the fish, reptile or amphibia was taken in an area where there was an appropriate open season. However, the phrase arguably might mean that a fish, reptile or amphibia may be possessed only in the area where it was taken and for 10 days thereafter and only if it was taken in an area where there was an

appropriate open season. If this latter interpretation is correct, then the repeal of Section 2357 might not accomplish the desired objective (i.e., to decriminalize carrying trout into an area where the trout season is closed without an affidavit) since the conduct criminalized by Section 2357 might be independently unlawful by virtue of Section 2001.

To resolve this interpretation question, we first examined predecessor statutes to Section 2001 to determine their meaning. The first incarnation of what is now Section 2001 was enacted in 1919 as Penal Code Section 626a, which provided as follows:

Whenever or wherever in any section of the code an open season for the pursuing, hunting, taking, catching, killing or possession of wild birds, wild animals or fish is prescribed, it shall be lawful for any person to retain in possession for an additional five days next succeeding the last day of such open season any of the wild birds, wild animals or fish legally taken, caught, killed or possessed during the open season therefor; provided, that not more than the bag limit of wild birds, wild animals or fish allowed to be taken, caught, killed or possessed during one calendar day in such open season may be held in possession during said additional period of five days.

1919 Cal. Stats., ch. 308, p. 501.

Section 626a as drafted did not distinguish at all between where a fish was taken or where it could be possessed. Instead, it made it lawful to possess a fish, apparently anywhere in the State, so long as the fish was "legally taken, caught, killed or possessed during the open season.

In 1933, Section 626a was incorporated into the newly enacted Fish & Game Code as Section 453. Section 453 provided that "[u]nless otherwise provided for a particular species, it is unlawful to possess birds, mammals, fish, mollusks, or crustaceans except during the open season and for five days thereafter, and not more than one daily bag limit thereof may be possessed during said period after the close of the open season." 1933 Cal. Stats., ch. 73, p. 439. Like former Section 626a, Section 453 did not purport to regulate *where* an animal could be possessed. Instead, it regulated only *when* an animal could be possessed (i.e., "during the open season and for five days thereafter"). In 1937, Section 453 was amended to extend from five to ten days the post-open season grace period for possession. 1937 Cal. Stats., ch. 320, p. 699.

In 1941 Section 453 was substantially amended to provide in pertinent part as follows:

Unless otherwise provided, it is unlawful to possess birds, mammals, fish, mollusks, or crustaceans except during the open season and if legally taken or brought into the State during the open season and for 10 days thereafter, and not more than one daily bag limit thereof may be possessed during said period after the close of the open season. Any game bird or game mammal may be possessed during a period other than the open season and 10 days thereafter if the carcass, or part thereof, is tagged in conformity with the rules and regulations of the commission. . . .

The phrase "except during the open season and if legally taken or brought into the State during the open season and for 10 days thereafter" is loaded with potential ambiguity since it is not at all obvious how the various and's and or's should be parsed. The 1941 amendment added the phrase "and if legally taken or brought into the State during the open season" to the section. Assuming that this new phrase was intended to add a single exception to the section, the section should be parsed as follows: except (1) during the open season, and (2) if legally taken or brought into the State during the open season, and (3) for 10 days thereafter. Unfortunately, this interpretation does not entirely make sense because part of (2) would seem to overlap entirely with (1). Specifically, (2) would apply "if legally taken . . . during the open season" which appears, as a matter of common sense, to be essentially the same thing as (1). Perhaps, however, the phrase "if legally taken" was intended to refer only to animals legally taken outside of the State (although if this was the intent, it was quite poorly expressed).

An alternative explanation, which makes more substantive sense, is that the exception clause should be parsed as follows: except (1) during the open season and if legally taken, or (2) brought into the State during the open season, and (3) for 10 days thereafter. As parsed, (1) would now expressly include the common sense limitation that it is unlawful to possess an animal that was illegally taken even if possession was during the open season. A difficulty with this interpretation, however, is that (2) does not fit grammatically within the flow of the sentence (since it would read as follows: "except . . . brought into the State during the open season").

It is not necessary to resolve this question for our purposes. The important point is that under either interpretation, it appears clear that the exception was defined in terms of a specified time period during which it was lawful to possess the listed animals. The exception was not defined in terms of a geographic location within the State where it was lawful to possess the list animals.

The Fish & Game Code was recodified in 1957, and Section 453 became Section 2001 as part of that recodification. As enacted in 1957, Section 2001 provided as follows:

Unless otherwise provided, it is unlawful to possess birds, mammals, fish, or amphibia except during the open season where taken and for 10 days thereafter; and not more than one daily bag limit thereof may be possessed during the period after the close of the open season.

1957 Cal. Stats., ch. 456, p. 1341.

The 1957 amendment was the first appearance of the phrase "open season where taken," a phrase which still appears in Section 2001. The most natural interpretation is that the entire phrase "the open season where taken and for 10 days thereafter" is intended to define a time period "during" which it is lawful to possess the listed animals. This is consistent with all of the prior versions of the statute which defined the exception in terms of time periods rather than geographic locations. Under this approach, the phrase "open season where taken" is intended to take account of the fact that there may be different open seasons for animals depending upon where an animal was taken. The time-period covered by the exception is thus defined by the open season in the place where taken.

This interpretation is also consistent with the usage of the phrase "open season where taken" in another section of the 1957 Fish & Game Code. Section 3080 provided, in pertinent part, that "[a]ny game bird or mammal may be possessed during a period other than the open season where taken and 10 days thereafter, if the carcass, or part thereof, is tagged in conformity with the regulations of the commission. . . ." 1957 Cal. Stats., ch. 456, p. 1357. Section 3080 derives from former Section 453, which was quoted above. Use of the phrase "during a period other than" makes it clear that the language which follows (i.e., "the open season where taken and 10 days thereafter") is intended to establish simply a time-period and not to establish geographic limitations.

Finally, this interpretation is consistent with a comment to Section 2001 which appeared in an August 1, 1956, report on the Revision of the Fish and Game Code prepared by the California Law Revision Commission. As of August 1, 1956, the draft of Section 2001 referred only to "the open season and for 10 days thereafter" and did *not* refer to "the open season where taken." The comment to Section 2001 in the report asks the following question: "What is meant by 'open season'? That in place where fish is taken or that in place to which removed? (See Sec. 2357 of this draft.)" California Law Revision Commission, *Proposed Revision of the Fish and Game Code (First Draft)*, p.

56 (August 1, 1956). The cross-reference to Section 2357 in the comment is a cross-reference to the same trout-affidavit statute that SB 1487 would repeal. The cross-reference suggests that the drafters were concerned that Section 2357 might cover some of the same ground as Section 2001 (i.e., both might deal with the situation of possessing fish in an area where the season was closed irrespective of whether it was taken in an area where the season was open). The question raised in the comment was ultimately addressed in the final version of Section 2001 by the addition of the phrase "where taken" to modify the phrase "open season." That is, the answer to the question "What is meant by 'open season'?" is "the open season *where taken*."

We were unable, even with the Commission's assistance, to locate a copy of any subsequent Commission reports dealing with Section 2001. However, the Legislative Counsel Notes to Section 2001 indicate the following legislative history: "'Where taken' after 'open season' to clarify and to specify administrative practice." In light of the August 1 report, the most likely sequence of events is that the Law Revision Commission was informed by Fish & Game personnel that the administrative interpretation of "open season" was "open season where taken," and that Section 2001 was amended to indicate that administrative interpretation.

Section 2001 was amended in 1972 to add reptiles to the list of protected animals. 1972 Cal. Stats., ch. 974. In 1998, it was amended into its current form in order to change the requirements under Section 3080 for possessing game birds or mammals outside of the open season.

While this legislative history is not entirely conclusive, it strongly suggests that the phrase "open season where taken" was intended only to define a time-period during which it was lawful to possess the animals listed in Section 2001, and that it was not intended to limit where within the State the listed animals could be possessed.

On March 30, 2000, we contacted the Department of Fish & Game to ascertain their current administrative interpretation of Section 2001. We were advised by Deputy General Counsel Ann S. Malcolm that the Department interprets Section 2001 as establishing a time-period during which it was lawful to possess fish, and that the section did not impose geographic limitations upon where within the State a fish could be possessed if it was lawfully taken in an area where the season was open.

Because Section 2001 does not make it unlawful to possess a fish (such as a trout) in an area where the season is closed so long as the fish was taken in an area where the season is open, Section 2001 does not duplicate the effect of Section 2357.

Thus, the repeal of Section 2357 will suffice to decriminalize conduct that most persons probably assume is legal.

Respectfully submitted,

Tony Smith
&
J. Clark Kelso
Institute for Legislative Practice

TROUT AFFIDAVIT

1 Fish and Game Code Section 2357 makes it unlawful to carry trout into an area
2 where the season is closed, unless a notarized affidavit was previously made in
3 duplicate in the area where the trout were taken¹ and the duplicate was left on file
4 with the notary.² The provision appears to pertain to dead trout, not live
5 specimens.³ Presumably, it is intended to facilitate determination of whether the
6 trout were lawfully taken.⁴

7 The Law Revision Commission has been directed to review this provision,
8 because its operation is problematic.⁵ It is questionable whether a notary public is
9 a proper repository of an affidavit.⁶ The requirement that a duplicate of the
10 affidavit be filed with the notary also appears unnecessary, because an angler's
11 possession of the original should be sufficient proof of the angler's proper activity.

12 Rather than correcting these technical imperfections in the statute, the
13 Commission recommends its repeal. The provision is obscure, even within the
14 sport fishing community. It appears to be unpublicized and unenforced.⁷ The
15 statutory requirements are also burdensome and inconsistent with common
16 expectations.

1. To "take" trout means to "hunt, pursue, capture, or kill, or attempt to hunt, pursue, catch, capture or kill" trout. Fish & Game Code § 86. (Unless otherwise indicated, all further statutory references are to the Fish and Game Code.)

2. The statute provides:

2357. It is unlawful to carry trout into an area where the season is closed unless an affidavit is made in duplicate before a notary public in the area in which the trout are or might be lawfully taken. Such affidavit shall state the date and place of taking such trout, and the name, address, and number of the angling license of the person legally taking such trout. The duplicate of the affidavit shall be left on file with the notary public before whom the affidavit is made.

3. Section 2357 is in a chapter of the Fish and Game Code entitled "Importation and Transportation of Dead Birds, Mammals, Fish, Reptiles, and Amphibia," in an article called "*Dead Wild Birds, Mammals, Fish, Reptiles, and Amphibia.*" (Emphasis added.) The immediately preceding chapters are "Importation, Transportation, and Sheltering of Restricted *Live Wild Animals*" and "Importation and Transportation of *Live Plants and Animals.*" (Emphasis added.) The latter chapter includes an article on "Aquatic Plants and Animals," which is further evidence that live fish are not within the purview of Section 2357.

For provisions on placing live fish and other aquatic plants and animals in California waters, see Sections 15200-15202.

4. An angler who possesses trout where the season is closed may be accused of taking the trout out of season. In defense, the angler may contend that the trout were taken where the season was open. If the angler raises this defense, the angler could support it by presenting the affidavit required by Section 2357. Without the required affidavit, the angler risks prosecution pursuant to that statute.

5. Gov't Code § 70219; see also *Trial Court Unification: Revision of Codes*, 28 Cal. L. Revision Comm'n Reports 51, 86 (1998).

6. See Gov't Code § 8205 (duties of notary public).

7. The requirement is not mentioned in *1999 California Sport Fishing Regulations*, a booklet that the Department of Fish and Game distributes to anglers to inform them of applicable restrictions. When contacted by a researcher from the Institute for Legislative Practice, Fish and Game personnel were surprised to learn of the statute's existence. See Yang & Kelso, *Transportation of Trout Into Closed Areas* (Inst. Legis. Prac. 1998). Legal research disclosed no reported cases construing the statute.

1 Fishing is a highly regulated activity⁸ and other restrictions on transporting fish
2 may be appropriate,⁹ but Section 2357 appears to achieve no purpose. It
3 criminalizes a failure to act (failure to obtain a notarized affidavit) under
4 circumstances where even a conscientious trout angler is unlikely to be aware of
5 the statutory requirement.¹⁰ It is not a necessary or a reasonable means of
6 enforcing the trout season.¹¹ The statute may be repealed without adverse effect.

8. See, e.g., 14 Cal. Code Regs. § 1.74 (salmon punch card and steelhead trout catch report-restoration card); 14 Cal. Code Regs. § 7.00 (bag and possession limits, fishing seasons); 14 Cal. Code Regs. § 7.50 (1999) (alphabetical list of waters subject to special restrictions on fishing methods and gear, use of bait, fishing seasons, size limits, bag and possession limits, fishing hours); 14 Cal. Code Regs. § 8.00 (1999) (supplemental restrictions on taking and possessing trout and salmon).

9. See, e.g., Sections 2356 (removal of trout from state), 2358 (shipping trout into area where season is closed); 14 Cal. Code Regs. § 135 (1999) (importation of fish commercially taken out-of-state); *Johnson v. Gentry*, 220 Cal. 231, 30 P.2d 400 (1934) (upholding statute prohibiting transportation of salmon through specified ocean districts of State in closed season); *Van Camp Sea Food Co. v. Department of Natural Resources*, 30 F.2d 111 (S.D. Cal. 1929) (Supreme Court has repeatedly recognized power of state to prohibit shipment of game lawfully taken within its borders to points without state, and to prohibit possession of game within state, when shipped from points without state); *Adams v. Shannon*, 7 Cal. App. 3d 427, 86 Cal. Rptr. 641 (1970) (upholding prohibition on importation and possession of piranha); *Santa Cruz Oil Corp. v. Milnor*, 55 Cal. App. 2d 56, 63, 130 P.2d 256 (1942) (state is owner of its fisheries for benefit of its citizens and can impose any condition on taking and use, after taking, of fish within its waters, reasonably necessary for conservation of its fisheries and beneficial use of its citizens).

Section 2001 (unlawful possession) restricts the time period during which trout may be possessed, but does not impose a geographic limitation on transportation of trout. See Smith & Kelso, *Possession of Fish During "Open Season Where Taken" Pursuant to Fish & Game Code Section 2001: A Brief Legislative History* (Inst. Legis. Prac. 2000).

10. A statute that criminalizes a failure to act in circumstances where a reasonable person would not think there was an obligation to act is inconsistent with established principles of fairness and due process. *Lambert v. California*, 355 U.S. 225, 227-29 (1958) (where person did not know of duty to register and there was no proof of probability of such knowledge, person may not be convicted consistently with due process); but see *State v. Huebner*, 252 Mont. 184, 827 P.2d 1260, 1263 (1992) (hunters are responsible for knowing laws pertaining to their sport). The Institute for Legislative Practice has reviewed Section 2357 and concluded that it is constitutionally suspect, although perhaps not unconstitutional. See *Transportation of Trout Into Closed Areas*, *supra* note 7.

11. The lack of necessity is evident from the lack of a similar affidavit requirement, and existence of a contrary provision, for black bass and spotted bass. See Section 2360 (black bass and spotted bass lawfully taken may be carried into area where season is closed). The apparent lack of enforcement (*supra* note 7) is further evidence that Section 2357 is unnecessary.

Although the affidavit required by Section 2357 would be relevant in a prosecution for taking trout out of season, other means of proof exist. Possession of trout where the season is closed is strong circumstantial evidence that the possessor took the trout out of season. See Section 2000 (possession of fish is prima facie evidence that possessor took fish); compare H. Thoreau, 8 Writings 94 (1906), *quoted in* Oxford Dictionary of Quotations, p. 696 (Oxford Univ. Press, 4th ed. 1992) ("Some circumstantial evidence is very strong, as when you find a trout in the milk."). The prosecution may also introduce other evidence (e.g., evidence that the trout was recently caught and the defendant had not recently been in an area where the season was open), as may the defense (e.g., witnesses who recently saw the defendant catch or possess trout in an area where the season was open).

PROPOSED LEGISLATION

1 **Fish & Game Code § 2357 (repealed). Trout affidavit**

2 SECTION 1. Section 2357 of the Fish and Game Code is repealed.

3 ~~2357. It is unlawful to carry trout into an area where the season is closed unless~~
4 ~~an affidavit is made in duplicate before a notary public in the area in which the~~
5 ~~trout are or might be lawfully taken. Such affidavit shall state the date and place of~~
6 ~~taking such trout, and the name, address, and number of the angling license of the~~
7 ~~person legally taking such trout. The duplicate of the affidavit shall be left on file~~
8 ~~with the notary public before whom the affidavit is made.~~

9 **Comment.** Section 2357 is repealed because it is unused and contrary to common expectations,
10 and because a notary is not a proper repository of an affidavit. See Gov't Code § 8205 (duties of
11 notary public).
